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Nos. 87-1622, 87-1697, and 87-1711

In The

Supreme Court of the United States

October Term, 1988

PHILIP BRENDALE,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE SWINOMISH TRIBAL COMMUNITY, et al., (additional amici listed inside) IN SUPPORT OF RESPONDENTS

Thomas R. Acevedo
Attorney at Law
Confederated Salish & Kootenai Tribes
Tribal Legal Department
P.O. Box 278
Pablo, MT 59855
(406) 675-2700
Counsel of Record for All Amici

Jeanette Wolfley
The Shoshone-Bannock Tribes of the Fort Hall Indian Reservation
P.O. Box 306
Fort Hall, ID 83203
(208) 238-3816
Counsel for the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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Jack F. Trope
Association on American Indian Affairs
95 Madison Avenue
New York, NY 10016
(212) 689-8720
Counsel for the Association on American Indian Affairs

Jeanne S. Whiteing
Dale T. White
Whiteing, Thompson & White
Attorneys at Law
6684 Gunpark Drive
Boulder, CO 80301
(303) 530-1335
Counsel for the Blackfeet Tribe of Indians of the Blackfeet Reservation and the Northern Arapaho Tribe of the Wind River Reservation

Scott B. McElroy
Attorney at Law
Greene, Meyer & McElroy
1007 Pearl St., Suite 240
Boulder, CO 80302
(303) 442-2021
Counsel for the Cheyenne River Sioux Tribe

W. Richard West, Jr.
Gover, Stetson, Williams, Eberhard & West, P.C.
1225 Rio Grande Blvd., N.W.
Albuquerque, NM 87104
(505) 842-6961
Counsel for the Shoshone Indian Tribe of the Wind River Reservation

Daniel A. Raas
Office of the Reservation Attorney
Lummi Indian Tribe
P.O. Box 5746
Bellingham, WA 98227
(206) 647-0234
Counsel for the Lummi Indian Tribe

Brian H. Collins
Dellwo, Rudolph & Schroeder, P.C.
Suite 250, Lincoln Building
West 818 Riverside Avenue
Spokane, WA 99201-0913
(509) 624-4291
Counsel for the Coeur d'Alene Tribe of Idaho and the Spokane Tribe of Indians

---

ADDITIONAL AMICI

Blackfeet Tribe of Indians of the Blackfeet Reservation;
Cheyenne River Sioux Tribe;
Coeur d'Alene Tribe of Idaho;
Confederated Salish & Kootenai Tribes of the Flathead Reservation;
Kalispel Indian Tribe;
Lummi Indian Tribe;
Native Village of Venetie;
Northern Arapaho Tribe of the Wind River Reservation;
Rosebud Sioux Tribe;
Shoshone-Bannock Tribes of the Fort Hall Reservation;
Shoshone Indian Tribe of the Wind River Reservation;
Spokane Tribe of Indians; and
Association on American Indian Affairs

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INTEREST OF THE AMICI CURIAE

Amici curiae are thirteen (13) federally-recognized Indian tribes and one (1) national Indian-interest organization.[1] Amici have a substantial interest in the issues raised

[1]Counsel for Petitioners and counsel for Respondents have consented to the filing of the brief of amici in support of Respondents. The consents are submitted for filing herewith.

in this case. The issues involve the scope of tribal authority to zone and regulate land use on non-member fee lands within Indian reservations as defined by federal law.

The Association on American Indian Affairs is a national, non-profit organization dedicated to protecting the rights and improving the welfare of American Indian and Alaska Native communities.[2] Several amici tribes currently exercise zoning or land use jurisdiction over non-member fee lands within their reservations. Other amici tribes exercise other forms of civil regulatory authority over such lands. All amici urge this Court to hold that Indian tribes have exclusive authority to zone and regulate land use on non-member fee lands within their reservations.

On most Indian reservations, the presence of non-members and fee lands are everyday facts of life. Amici do not deny that non-members have rights on Indian reservations, including important rights tied to use of their land. But the exclusive authority of Indian tribal governments to regulate the zoning and land use of non-member fee lands is crucial, especially where, as in this case, critical Indian interests are involved. Without such authority, Indian tribes cannot adequately preserve, protect, and perpetuate the rights and resources under federal law and tribal law of all people on Indian reservations.

SUMMARY OF ARGUMENT

Petitioners argue that the County of Yakima has exclusive authority to zone and regulate land use on non-

[2]The Association on American Indian Affairs was founded in 1922. It is the largest Indian-interest organization in the country, with a membership of about 14,400 individuals, Indian and non-Indian.

member fee lands within the Yakima Indian Reservation. They rely largely on this Court's opinion in *Montana v. United States.* In Part I of this brief, amici show three independent reasons that this argument should be rejected and tribal authority over the lands should be upheld. In Part II, amici show that tribal authority is exclusive because the tribal interests and federal interests in tribal zoning and land use regulation on non-member fee lands override any interests that the state and county have shown in zoning those lands within the reservation.

As interpreted by this Court in *Montana,* the General Allotment Act did not absolutely divest Indian tribes of their authority over allotted lands. In *Montana,* this Court established a rebuttable presumption that if a tribe could demonstrate that activities on the allotted lands affected a tribe's ability to protect self-government, then the presumption in favor of no tribal authority over those lands would be overcome. This rebuttable presumption test set out by the Court in *Montana* did not fully examine the repudiation of the Allotment Act nor fully consider it in the context of modern federal Indian law and policy.

Second, and alternatively, the holding of *Montana* should be limited to those situations where the tribal regulation treats non-members disparately from members. The facts presented to the Court in *Montana* involved tribal prohibition of non-members hunting and fishing on non-member fee lands within the reservation. But where, as here, the tribal regulation treats members and non-members equally, the rebuttable presumption test should not be applied.

Third, and alternatively, should this Court decide not to limit *Montana,* the Court should find that the tribal

regulatory interest in this case comports with the holding in *Montana*. Zoning by the County of non-member fee lands directly affects the political integrity, economic security, and the health and welfare of the Tribe.

Tribal authority to zone non-member fee lands is exclusive because the authority of the County to zone concurrently these lands is preempted by federal law. Preemption exists in part by virtue of the fact that county zoning would infringe on the self-governing authority of the Tribe to make its own laws. In addition, concurrent tribal and state zoning and land use authority is inherently unworkable. Finally, because the interest of the Tribe in exercising exclusive zoning and land use authority on non-member fee lands within the reservation boundaries is so necessary to direct the method for development of the Reservation, the proffered interest of the County in this case is secondary to that of the Tribe.

ARGUMENT

I. TRIBES HAVE AUTHORITY TO ZONE NON-MEMBER FEE LANDS WITHIN A RESERVATION.

The Yakima Indian Nation (Tribe) regulates through zoning and land use regulation its entire reservation, including land owned in fee by non-members. In this case, Petitioners claim that the County of Yakima (County) has exclusive zoning authority over the non-member fee lands within the reservation. The Tribal zoning scheme and the County scheme are in direct conflict. Resolution of this case presents an opportunity to revisit the issues raised in the case of *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*), particularly in light of federal Indian policy favoring tribal self-determination, and recent deci-

sions of this Court regarding tribal jurisdiction over non-Indians on the reservation.

In *Montana,* the Crow Tribe tried to prohibit non-members from hunting and fishing on non-member fee lands withir the Crow Indian Reservation. Its authority to do so was denied. The Court held that neither the Crow Treaties nor inherent tribal sovereignty supported the Tribe's exercise of regulatory authority in that case. *Montana,* 450 U.S. at 557-567. Petitioners ask this Court to apply *Montana* to deny the Tribe's authority to zone and regulate land use on non-member fee lands within the Yakima Reservation. For three independent reasons, *Montana* should not be so applied.

A. Federal Law And Policy Favoring Tribal Self-Determination Require That This Court Re-evaluate Montana.

Petitioners, and some amici in support of Petitioners, argue that this case should be resolved in accordance with this Court's intimation in *Montana,* that tribal authority over allotted (fee) lands has been limited by federal law. This argument is premised on the Court's footnote in *Montana* which suggested the General Allotment Act of 1887, 25 U.S.C. §§ 331-358, as a source of non-member land rights in that case. *Montana,* 450 U.S. at 559 n.9. Petitioner's argument essentially asks this Court to find that *Montana* did not go far enough and that the General Allotment Act does not simply limit tribal authority over non-member fee lands, but completely divests it. Petitioners thus would close the door left open in *Montana* for the exercise of tribal authority over non-member fee lands, *i.e.,* the tribal interest test. That test establishes a rebuttable presumption that tribes lack regulatory authority unless the tribe bears the burden of showing a sufficient

tribal interest to sustain regulation of non-member fee lands. *See Montana*, 450 U.S. at 565-566.

Amici submit that the *Montana* presumption favoring non-members should be erased by this Court. Even if the General Allotment Act originally created a rebuttable presumption against tribal authority over allotted lands, such presumption has been eradicated by modern federal Indian law and policy. As this Court has held, the policy of allotment was repudiated by the passage of the Indian Reorganization Act, 25 U.S.C. §§ 461-462. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 478-479 (1976) (*Moe*); *see also Montana*, 450 U.S. at 559 n.9 ("the policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act"). The current federal Indian policy is to actively encourage tribal self-government and economic self-sufficiency. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (*LaPlante*); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (*Cabazon*). To further this policy, several recent statutes in the area of environmental law expressly confirm tribal regulatory authority over all types of land within reservations, including non-member fee lands. *See, e.g.*, the Clean Water Act of 1987, 33 U.S.C. § 1377;[3] the Safe Drinking Water Act, 42 U.S.C.

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[3]The legislative history of the Clean Water Act indicates that Congress expressly considered tribal authority over non-member fee lands as a necessary aspect of tribal sovereignty. A memorandum describing the Indian provisions stated: "A. Indian tribes are self-governing, exercising limited powers of inherent sovereignty within their reservations. B. *In the exercise of that power, Indian tribes have the right to regulate lands and other natural resources within the reservation, including non-Indian owned fee lands or resources.*" 133 Cong.Rec. S733-02 (1987) (emphasis added).

§ 300f; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9626 (Superfund); and the Clean Air Act, 42 U.S.C. § 7474(c).

The opinion in *Montana* did not adequately analyze or give proper weight to legislation enacted after the General Allotment Act, such as the Indian Reorganization Act and the Indian Country Act, 18 U.S.C. § 1151.[4] This case presents an opportunity to correct this omission, especially in light of recent laws which reflect a clear federal policy of across-the-board tribal control within reservations. When the General Allotment Act is read *in pari materia* with the Indian Reorganization Act and the Indian Country Act, congressional intent that tribal powers extend to fee lands within a reservation is unmistakable. The recent environmental laws, passed after *Montana*, evidence congressional intent to recognize continuing tribal jurisdiction over non-member fee lands within the reservation.[5] Moreover, decisions in the tribal regulatory area such as *Montana* are in conflict with recent pronouncements by this Court in the area of tribal adjudicatory authority. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and *LaPlante*, 480 U.S. at 13-18, speak of reservation-wide tests for adjudicatory authority. This

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[4]This Act expressly provides that fee lands within Indian reservations are Indian Country. 18 U.S.C. § 1151(a). This Court has held that for purposes of tribal jurisdiction this definition of Indian Country is applicable in civil cases as well as in the criminal context. *Cabazon*, 480 U.S. at 207 n5.

[5]Contrary to the arguments of some amici in support of Petitioners, e.g., Brief of the States of Arizona, et al., at 23-24 & n.16, the express provisions for tribal regulatory authority in these statutes do not mean that absent such express provisions, tribes generally lack such authority. Rather, the provisions represent an effort by Congress to preempt statutorily an area of law, while at the same time recognizing inherent tribal sovereign powers.

case presents an opportunity to bring the regulatory area in line with the adjudicatory cases.

The existence of such uniform tribal powers does not deprive non-members of any cognizable rights. Congress, of course, has addressed the rights of individuals who are subject to tribal governmental authority in the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. *See Dodge v. Nakai,* 298 F.Supp. 17, 24 (D. Ariz. 1969) (the term "any person" in 25 U.S.C. § 1302(8) applies to non-members). Some tribal constitutions extend non-members bill of rights provisions, *e.g.,* equal protection, due process. *See, e.g., Tom v. Sutton,* 533 F.2d 1101, 1105 (9th Cir. 1976) (art. VIII, Const. of the Lummi Indian Tribe). In addition, as a general course of conduct, tribal laws contain provisons patterned after the Administrative Procedure Act, 5 U.S.C. §§ 551-559, under which notice of pending regulations is given (including to non-members) and hearings are held (open to non-members) before and after tribal laws are enacted or amended. *See, e.g.,* 5 Fort Hall Land Use Operative Policy Guidelines § 7 (1979). Although not required for all tribes, many tribal zoning and land use regulations are federally-approved. Some tribes, *e.g.,* the Confederated Salish and Kootenai Tribes, the Shoshone-Bannock Tribes, and the Lummi Indian Tribe, have established regulatory bodies on which non-members have permanent positions as a matter of tribal law. Finally, the integrity of the tribal dispute resolution forums in which claims challenging tribal authority must be brought has been increasingly recognized by this Court. *See Williams v. Lee,* 358 U.S. 217, 223 (1959); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); *National Farmers,* 471 U.S. at 855-857; *LaPlante,* 480 U.S. at 13-14.

Moreover, this Court has previously rejected the argument of lack of enfranchisement as constituting grounds for invalidating a tribal regulation. In *United States v. Mazurie,* 419 U.S. 544 (1975), Justice Rehnquist, writing for the Court, stated that the argument of a denial of equal protection and due process in the context of non-membership in a tribe was disposed of in *Williams v. Lee,* 358 U.S. at 223. *United States v. Mazurie,* 419 U.S. at 557-558; *see also Moe,* 425 U.S. at 479-80. And when non-Indian governments, *i.e.,* states or their political subdivisions, zone land within their geographic boundaries, there is no requirement that the owner of land be a member of the body politic of that jurisdiction.

B. Second, And Alternatively, Montana Should Be Limited To Cases Where Tribal Regulation Treats Non-Members Differently Than Members, And Such Is Not The Case Here.

It is significant that in *Montana,* the tribal regulation sought to prohibit *only* non-members from hunting and fishing on their lands. Such is not the case here and therefore *Montana* does not apply. The Yakima Tribe's zoning and land use regulations treat members and non-members alike. Amici submit that in such cases, where the tribal regulation is "even-handed," the test for tribal regulatory jurisdiction should presume in the first instance that tribes have jurisdiction. For instance, in non-Indian law cases, when states and their political subdivisions exercise their legitimate police power and regulate on behalf of their citizens, the validity of such regulation is presumed. *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 442-443 (1960); *Kelly v. Washington,* 302 U.S. 1, 10 (1937). Therefore, the concern expressed in *Montana* about abuses of tribal power or disparate treat-

ment by tribes is addressed when members are included among those regulated.

In cases where the tribal regulation treats members and non-members alike, the rights of non-members are protected by the Indian Civil Rights Act, by tribal law, and by access to the tribal courts. *See supra* p. 8. In addition, the rights of non-members are protected in such cases because any perceived abuses or injustice caused by the regulation will also fall on tribal members and most likely will be corrected by them through the normal political processes. Moreover, tribes are cognizant of Congress' plenary authority over them and the ability of Congress to limit tribal jurisdiction if they do not act in a fair and responsible manner. Therefore, in instances of even-handed tribal regulation, the non-member, like the member, should bear the burden of establishing a lack of tribal authority. The non-member must show either divestment by a specific federal statute or treaty provision, *cf. LaPlante*, 480 U.S. at 17-18 (tribal civil adjudicatory jurisdiction over actions involving non-Indians on the reservation "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute"), or that the exercise of tribal authority would be inconsistent with "overriding interests of the National Government." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (*Colville*).

Neither of these showings have been made in this case. Petitioners have failed to show specific divestment of tribal authority, because, contrary to their arguments and those of their amici, *Montana* did not hold that the General Allotment Act specifically divested tribes of all regulatory jurisdiction over allotted lands. *Montana* expressly

recognized that Indian tribes "*retain* inherent sovereign power" to regulate non-members *on fee lands* within a reservation in cases where the non-member enters a consensual relationship with the tribe or its members, or where the non-member's conduct directly affects the political integrity, the economic security, or the health and welfare of the tribe. *Montana*, 450 U.S. at 565-566 (emphasis added). *See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142-143 (1982) (*Merrion*), *citing with approval Buster v. Wright*, 135 F. 947, 952 (8th Cir. 1905) (Indian tribes retain power to tax non-Indians within the reservation notwithstanding non-Indian ownership of deeded land and the creation of non-Indian local governments). The clear implication is that any issue of specific divestment by the General Allotment Act has been resolved in favor of Indian tribes.

Nor have Petitioners shown that the exercise of tribal zoning is inconsistent with overriding federal interests. The interests that triggered the limits on tribal criminal jurisdiction in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), do not apply to the civil area. *See Montana*, 450 U.S. at 565-566; *National Farmers*, 471 U.S. at 854-856; *LaPlante*, 480 U.S. at 13-14. Congress has never expressed any overriding interests with which tribal authority over non-member fee lands is inconsistent, and in fact has recently approved such authority in several environmental regulation laws. *See supra* p. 6-7. There is nothing exclusively federal about zoning and land use regulation and therefore the exercise of tribal jurisdiction in such matters does not in the least bit threaten federal interests. States and their political subdivisions are generally permitted to zone and regulate land use within their

exterior boundaries. Petitioners show no federal interest that prohibits or limits tribal authority to do so as well.

C. Third, And Alternatively, The Yakima Tribe Has Demonstrated A Tribal Interest Which Would Sustain Its Authority Under Montana.

Amici maintain that this Court should acknowledge that *Montana* is incompatible with modern federal Indian law and policy, or alternatively, that *Montana* should be limited to cases in which the tribal regulation treats non-members differently than members. However, assuming that *Montana* remains unmodified, amici will show below that the tribal interest in zoning and land use regulation is sufficient to sustain tribal authority under *Montana.*

The Tribe's fundamental interest is in exercising "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee,* 358 U.S. at 220. This right of self-government includes the right to regulate matters affecting tribal members or matters arising within tribal territory. *Cabazon,* 480 U.S. at 206-207; *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 331-333 (1983) (*Mescalero Apache*); *Merrion,* 455 U.S. at 136-149; *Colville,* 447 U.S. at 152-154; *Moe,* 425 U.S. at 474-480. The Tribe also has an interest in exercising its right to condition the presence of non-members on the reservation upon submission to tribal laws. *See Mescalero Apache,* 462 U.S. at 333.

Plainly, non-members' development or use of land directly affects the political integrity, economic security, and the health and welfare of the Tribe. As the court below found, "[z]oning, in particular, traditionally has been considered an appropriate exercise of the police power of

a local government, precisely because it is designed to promote the health and welfare of its citizens. . . . Tribal zoning is particularly important because of the unique relationship of Indians to their lands." *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529, 534 (9th Cir. 1987) (citations omitted) (*Whiteside*). Zoning and land use regulation are essential means of protecting resources and the environment while at the same time permitting controlled growth and improving the economy.

In *Montana*, this Court was unable to determine a tribal interest in prohibiting non-members from hunting and fishing on fee lands.[6] In contrast, the tribal interest in regulating zoning and land use on non-member fee lands is readily apparent and well-supported by federal law and policy. This Court should affirm the decision below that the Yakima Nation has satisfied the *Montana* direct effect test to support its exercise of zoning authority over non-member fee lands.

II. TRIBAL AUTHORITY IS EXCLUSIVE.

A. County Authority On Fee Lands Is Preempted By Federal Law, And It Would Impermissibly Infringe On Tribal Self-Government.

As a corollary of the plenary federal authority over Indian tribes, and in recognition of the sovereignty re-

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[6] "The Court stressed that in Montana the pleadings 'did not allege that non-Indian hunting and fishing on [non-Indian] reservation lands [had] impaired [the Tribe's reserved hunting and fishing privileges]' . . ., or 'that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe,' . . . and that the existing record failed to suggest 'that such non-Indian hunting and fishing . . . threaten the Tribe's political or economic security.'" *Mescalero Apache*, 462 U.S. at 331 n.12 (brackets in original; citations omitted).

tained by Indian tribes even after formation of the United States, state regulation generally does not extend to Indian reservations. *See Cabazon*, 480 U.S. at 214-217 & n.18. States may exercise concurrent jurisdiction over non-Indians on the reservation "only if not pre-empted by the operation of federal law," and if the state action does not infringe on the "right of reservation Indians to make their own laws and be ruled by them." *Mescalero Apache*, 462 U.S. at 332-333. Here, the Tribe is exercising its rights of self-government—confirmed in federal law—by regulating through zoning and land use regulation. The Tribe has determined to control adverse commercial development and subdivision density while at the same time allowing for compatible residential and commercial growth. This action of the Tribe is most consistent with the notion that reservations were established as tribal homelands, "insulated . . . by a 'historic immunity from state and local control,' " *Mescalero Apache*, 462 U.S. at 332, while at the same time it recognizes the rights of non-Indians who have chosen freely to move onto those homelands.

Plainly, state or county authority to zone and regulate land use on non-member fee lands within reservations is preempted or would infringe on the right of the Tribe to make its own laws. State jurisdiction would interfere with federal and tribal interests, including traditional notions of Indian sovereignty and the congressional goal of Indian self-government, especially the overriding goal of encouraging tribal self-sufficiency and economic development. *See Cabazon*, 480 U.S. at 216-217. The County zoning and land use regulations would permit development that the Tribe's would not, thereby devastating tribal efforts.

Where the tribal and state or county regulation conflict, to allow the state or the county to zone non-member fee lands would create for the landowner an impossible compliance situation. This is unlike the situation where a tax is imposed on a property owner by more than one jurisdiction wherein the only burden on the taxpayer is that of having to pay more than one tax. *See, e.g., Colville,* 447 U.S. at 154-159 (upholding dual tribal and state taxation). The dual compliance problem of conflicting zoning regulations where the tribe and the state or county governments are involved is also not akin to those instances of multi-jurisdictional zoning in the non-Indian law context. Those types of situations typically trace their zoning authority to a single sovereign: the state. Tribes and state governments are separate sovereigns and do not answer to one another for their governmental powers; thus reconciliation of conflicting zoning regulations cannot be accomplished by having the authorizing sovereign resolve the dilemma.

This Court has recognized this problem in a regulatory context. In *Mescalero Apache,* a case very similar to this, in which the State of New Mexico sought concurrent authority over hunting and fishing by non-members on the reservation, this Court stated:

> It is important to emphasize that concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation. Concurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources. The Tribe would thus exercise its authority over the reservation only at the sufferance of the State. The tribal authority to regulate hunting and fishing by nonmembers, which has been repeatedly

> confirmed by federal treaties and laws and which we explicitly recognized in Montana v. United States, supra, would have a rather hollow ring if tribal authority amounted to no more than this.

Mescalero Apache, 462 U.S. at 338. The reasoning in *Mescalero Apache* is fully applicable here. As in that case, the exercise of concurrent state jurisdiction in this case would completely "disturb and disarrange" the established tribal regulatory scheme.

B. While A Showing Of Significant Off-Reservation Impacts Might Justify Concurrent Jurisdiction, There Has Been No Such Showing In This Case, And In Any Event, The Tribe's Interests Are Compelling.

Several decisions of this Court have permitted the assertion of concurrent state jurisdiction over activities and areas, not involving land ownership, which tribes regulate, upon a showing of "sufficient" state interests. *See, e.g., Cabazon*, 480 U.S. at 216-217.[7] Amici suggest that, in cases such as this, where the Tribe has a land use regulatory scheme in place, which applies equally to members and non-members, non-members should be required to show significant off-reservation impacts to justify concurrent state jurisdiction.

For instance, non-members should be required to show an interest in conservation of a scarce resource guaran-

[7]Amici maintain that tribal authority is exclusive over all lands within the reservation boundaries. As to the issue of the scope of tribal authority in the area which does not have controlled access (Petitioner Wilkinson's and Petitioner County of Yakima's cases), amici adopt the arguments of Respondents that this issue is not properly before the Court at this time. Alternatively, should this Court find that the record is adequate to determine whether tribal authority is exclusive or concurrent in that area, amici submit that the record as it now stands reflects that the Tribe should prevail.

teed to them by federal treaty, *e.g., Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968), or that activities occurring on-reservation have off-reservation effects, *e.g., Rice v. Rehner,* 463 U.S. 713 (1983), or that denial of non-Indian authority would severely affect the health or welfare of the state, *cf. Montana,* 450 U.S. at 566. But the mere provision of on-reservation services and functions should not amount to a state interest which would justify concurrent jurisdiction.

Moreover, even under a threshold showing of off-reservation impacts, the state interest should fall to a compelling tribal interest. States should not be permitted to regulate concurrently through land use and zoning fee lands within a reservation unless they show that it is necessary to mitigate against impacts occurring beyond the reservation boundaries, and the tribe does not have a competing compelling interest in regulation.

Petitioners, of course, have not demonstrated such a state interest in this case. They do not claim the County is regulating in the interests of conservation of a treaty resource, and they have not shown any off-reservation effects which would justify concurrent regulation. *Whiteside,* 828 F.2d at 535-536.

Moreover, the tribal interests in this case are compelling. In addition to its general interest in exercising its sovereign authority—an interest well-supported by modern federal law and policy—tribal zoning protects agriculture, grazing, timber, and wildlife resources. *Whiteside,* 828 F.2d at 535. These resources are the Tribe's main economic support and food supply. The Tribe's cultural values also motivate protection and control of land use. The Tribe has a great interest in preventing

unfettered growth and its detrimental side effects, which, if permitted, will be irreversible and a force to which the Tribe has no defense. From initially expressly reserving its rights to land and resources in its treaty, to the modern zoning and land use regulation, the Tribe has engaged in a concerted progressive effort to control and manage the reservation's land and natural resources.

Finally, common sense dictates that in order for zoning to be effective, it needs to be vested in the one government which has the authority to regulate all lands within the reservation—the tribe. The essence of zoning is a comprehensive scheme. Since the County clearly lacks jurisdiction over Indian lands it cannot administer an all-encompassing code on the reservation or address cumulative impacts on both fee and trust lands. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977). Therefore exclusive authority over the non-member fee lands must lie with the Tribe.

Given the strong tribal interests and the absence of any significant off-reservation impacts in support of a state interest, State or County authority to zone within the Yakima Reservation should be held to be preempted and not otherwise justified.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be remanded for modification with instructions from this Court in light of the foregoing changes in *Montana* suggested by amici, or alternatively, the decision below should be affirmed.

Respectfully submitted,

Thomas R. Acevedo
Attorney at Law
Confederated Salish &
Kootenai Tribes
Tribal Legal Department
P.O. Box 278
Pablo, MT 59855
(406) 675-2700
Counsel of Record for All Amici

Jack F. Trope
Association on American
Indian Affairs
95 Madison Avenue
New York, NY 10016
(212) 689-8720
Counsel for the Association on American Indian Affairs

Jeanne S. Whiteing
Dale T. White
Whiteing, Thompson & White
Attorneys at Law
6684 Gunpark Drive
Boulder, CO 80301
(303) 530-1335
Counsel for the Blackfeet Tribe of Indians of the Blackfeet Reservation and the Northern Arapaho Tribe of the Wind River Reservation

Scott B. McElroy
Attorney at Law
Greene, Meyer & McElroy
1007 Pearl St., Suite 240
Boulder, CO 80302
(303) 442-2021
Counsel for the Cheyenne River Sioux Tribe

Jeanette Wolfley
The Shoshone-Bannock Tribes
of the Fort Hall Indian
Reservation
P.O. Box 306
Fort Hall, ID 83203
(208) 238-3816
Counsel for the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation

W. Richard West, Jr.
Gover, Stetson, Williams,
Eberhard & West, P.C.
1225 Rio Grande Blvd., N.W.
Albuquerque, NM 87104
(505) 842-6961
Counsel for the Shoshone Indian Tribe of the Wind River Reservation

Daniel A. Raas
Office of the Reservation
Attorney
Lummi Indian Tribe
P.O. Box 5746
Bellingham, WA 98227
(206) 647-0234
Counsel for the Lummi Indian Tribe

Brian H. Collins
Dellwo, Rudolph &
Schroeder, P.C.
Suite 250, Lincoln Building
West 818 Riverside Avenue
Spokane, WA 99201-0913
(509) 624-4291
Counsel for the Coeur d'Alene Tribe of Idaho and the Spokane Tribe of Indians

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